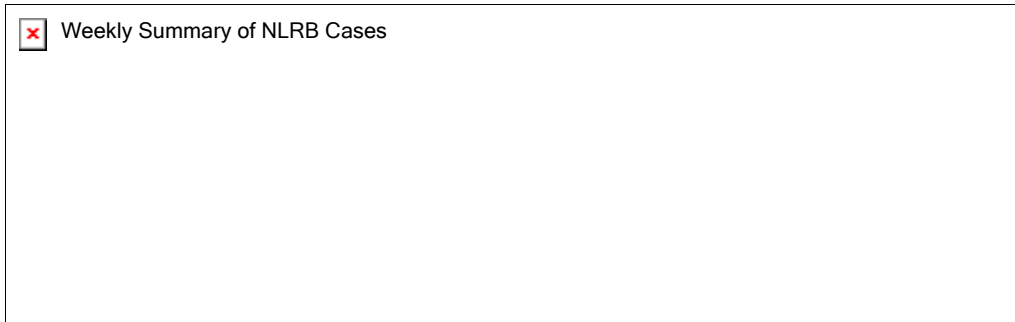


ABOUT THE WEEKLY SUMMARY

The Weekly Summary of NLRB cases, as the name implies, is a publication that summarizes each week all published NLRB decisions in unfair labor practice and representation election cases, except for summary judgment cases. It also lists all decisions of NLRB administrative law judges and direction of elections by NLRB regional directors. Links are established from the weekly summary index to the summaries and from the summaries to the full text of the decisions.

[Index of Back Issues Online](#)

December 28, 2001

W-2823

CASES SUMMARIZED

SUMMARIES CONTAIN LINKS TO FULL TEXT

[Allied Production Workers Union Local 12](#), Lansing and Waukon, IA
[Anheuser-Busch Inc.](#), Baldwinsville, NY
[Avondale Industries, Inc.](#), New Orleans, LA
[C. Factotum, Inc.](#), Detroit, MI
[The Concrete Company](#), Mobile, AL
[J.P. Phillips, Inc.](#), Schiller Park, IL
[Mastronardi Mason Materials Co.](#), Jamaica, NY
[Mercy Hospital of Buffalo](#), Buffalo, NY
[Miramir Sheraton Hotel](#), Santa Monica, CA

OTHER CONTENTS[List of Decisions of Administrative Law Judges](#)

Press Release:

[\(R-2448\) Anticipating Absence of Quorum, Board Temporarily Delegates to General Counsel Full Authority on Court Litigation Matters](#)

Operations-Management Memoranda:

[\(OM 01-45\) Issuance of Subpoenas in Representation Cases](#)
[\(OM 02-17\) GPRA and "Test of Cert" Cases, FY 2001 Results](#)

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Allied Production Workers Union Local 12 and Local 10 (Northern Engraving Corp.) (18-CB-3913, et al.; 337 NLRB No. 6) Lansing and Waukon, IA Dec. 19, 2001. The Board majority of Chairman Hurtgen and Member Walsh found Respondent Union Local 10 violated Section 8(b)(1)(A) of the Act "[b]y receiving, accepting, and retaining the service charges deducted from the wages of Ellen Jones, Ruth H. Vine, and Cynthia Hertrampf after they resigned their union membership, and by doing so solely on the authority of a checkoff authorization that did not clearly and unmistakably provide for postresignation service fee obligations." In a separate concurring opinion, Chairman Hurtgen said while he agreed that there is a Section 10(b) bar to the finding of a violation as to employees Prichard and Snodgrass, he disagreed with his colleagues' effort to distinguish *Kroger Co.*, 334 NLRB No. 113 (2001). [\[HTML\]](#) [\[PDF\]](#)

Member Walsh stated in a footnote that the result would have been different if there had never been a valid checkoff authorization. "In that instance, each deduction and remittance of dues within the 10(b) period would be another unlawful act in a continuing violation," he said.

Member Liebman, concurring and dissenting in a separate opinion, agreed with her colleagues in dismissing the complaint allegations pertaining to Respondent's Local 12's receipt of money that had been checked off from the wages of employees Prichard and Snodgrass, but would also dismiss the complaint allegations against Respondent Local 10 as to the moneys that had been checked off from the wages of employees Vine, Jones and Hertrampf. She stated: "I conclude that the dismissal of all the complaint allegations is warranted because the checkoff authorizations originally signed by these employees contained explicit language clearly setting forth an obligation for them to pay the amounts checked off, even in the absence of their union membership."

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Sherry Prichard, Carolyn Snodgrass, Ruth Vine, Ellen Jones, and Cynthia Hertrampf, individuals; complaint alleged violation of Section 8(b)(1)(A) and (2). Parties waived their right to a hearing before an administrative law judge.

* * *

Anheuser-Busch Inc. (3-CA-21796, et. al.; 337 NLRB No. 2) Baldwinsville, NY Dec. 19, 2001. The Board affirmed the administrative law judge's finding that the Respondent has engaged in various violations of Section 8(a)(1) of the Act following its implementation of a final offer during unsuccessful contract negotiations at its Baldwinsville, NY facility. The unfair labor practices included: refusing to allow a requested union steward to represent an employee in violation of the employee's rights under Section 7; threatening to discharge an employee if he engaged in concerted protected activity, including speaking at corporate communication meetings; and threatening an employee with reprisal for filing charges with the NLRB. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Teamsters Local 1149; complaint alleged violation of Section 8(a)(1). Hearing at Syracuse, March 8-10, 2001. Adm. Law Judge Wallace H. Nations issued his decision July 7, 2000.

* * *

Avondale Industries, Inc. (15-CA-12171, et al.; 337 NLRB No. 15) New Orleans, LA Dec. 19, 2001. The Board issued an order approving a settlement agreement between the Respondent and the New Orleans Metal Trades Council, ending years of litigation over attempts by the labor organization to unionize the Respondent's employees. At the request of the parties, the U.S. Court of Appeals for the Fifth Circuit on Nov. 29, 2001, remanded to the Board its decisions in *Avondale I*, 329 NLRB 1064 (1999); and *Avondale III*, 333 NLRB No. 74 (2001). (*Avondale II* involved a July 6, 2001 decision issued by Administrative Law Judge Philip P. McLeod in cases 15-CA-12639, et al. The parties in that matter entered into a formal settlement stipulation approved by the Board separately on Dec. 19, 2001.) [\[HTML\]](#) [\[PDF\]](#)

The settlement agreement resolving issues in *Avondale I* and *III* provides for "the reinstatement for all discharged and transferred discriminates, the hire of one applicant, removal from personnel files of any and all references to the unlawful discharges, transfers and suspensions, and rescission of all warning notices." The agreement provides for one Notice to Employees combining the notice provisions of *Avondale I*, *II*, and *III* with minor modifications. The agreement also requires the Respondent to pay a lump sum backpay of \$2,150,274 for the three Avondale proceedings. Finally, the Board's order in *Avondale I*, 320 NLRB 1064 at 1071 (1999), is modified by eliminating the special remedies in paragraphs 2(p) through 2(w).

(Chairman Hurtgen, and Members Liebman and Walsh participated.)

* * *

C. Factotum, Inc. (7-CA-42352(1)(E), 42352(2)(E); 337 NLRB No. 1) Detroit, MI Dec. 19, 2001. In a supplemental decision, the Board adopted the administrative law judge's recommended order denying the Respondent's application for attorneys' fees and expenses pursuant to the Equal Access to Justice Act (EAJA). The Board rejected the Respondent's contention that it is entitled to fees because in the underlying case, 334 NLRB No. 23 (2001), the judge recommended dismissing the allegations of paragraph 8 in the complaint for lack of evidence. The Board agreed with the judge that the General Counsel's overall position in the case was substantially justified, regardless of any deficiencies involving paragraph 8. [\[HTML\]](#) [\[PDF\]](#)

It stated:

Paragraph 8 alleged unlawful threats of job loss made in late June 1999. Evidence of threats at that point in time may have been lacking. But even so, the allegations of paragraph 8 are essentially the same as those of paragraph 9(a), which alleged threats of job loss in mid-July 1999. There *was* evidence supporting the General Counsel's view that threats were made then, although the judge ultimately found that, considered in context, the statements were not unlawful.

The Applicant's reliance on *Hess Mechanical Corp. v. NLRB*, 112 F.3d 146 (4th Cir. 1997), awarding EAJA fees, is misplaced. There, the court concluded that the General Counsel was not substantially justified in proceeding to issue a complaint without further investigation. The only precomplaint evidence supporting the General Counsel's position was the charging party's affidavit, and there was substantial uncontroverted evidence supporting the respondent's defense. Here, the Applicant does not contend that precomplaint evidence raised a serious question about the complaint's viability.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Adm. Law Judge C. Richard Miserendino issued his supplemental decision Sept. 7, 2001.

* * *

The Concrete Company (15-CA-16039, 16096; 336 NLRB No. 135) Mobile, AL Dec. 19, 2001. A Board majority of Members Liebman and Walsh affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) by informing employees of its predecessor "[t]here's no union; the Union's gone" and Section 8(a)(3) and (1) by refusing to hire Titus James Edwards and Calvin Mack Taite on December 20, 2000, because of their respective positions as job steward and alternate job steward. They also adopted the judge's remedy requiring the Respondent to restore the terms and conditions of employment under the predecessor's contract with the Union until it negotiates a new contract with the Union or negotiates to impasse. [\[HTML\]](#) [\[PDF\]](#)

Dissenting in part, Chairman Hurtgen agreed that the Respondent's statement (that there would be no union at its facilities) violated Section 8(a)(1). However, he disagreed that the statement should cause a forfeiture of a successor employer's right to unilaterally set initial terms and conditions of employment, noting his dissenting opinion in *Pacific Custom Materials*, 327 NLRB 75 (1998).

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Teamsters Local 991; complaint alleged violation of Section 8(a)(1), (3) and (5). Hearing at Mobile on July 17 and 18, 2001. Adm. Law Judge George Carson II issued his decision Sept. 11, 2001.

* * *

J.P. Phillips, Inc. (13-RC-20544; 336 NLRB No. 130) Schiller Park, IL Dec. 17, 2001. The Board, reversing the hearing officer, ordered that a second election be held based on the Intervenor having received via fax an incomplete *Excelsior* list from the Region and the later receiving by mail from the Region an untimely list. The decision by Members Liebman and Walsh; Chairman Hurtgen concurred in the result. [\[HTML\]](#) [\[PDF\]](#)

A mail ballot election was held April 9 through 23, 2001. The results of the election showed 31 ballots for the Petitioner, 10 for the Intervenor, 2 for neither, and 2 challenged ballots, an insufficient number to affect the results.

On March 21 the Employer provided the Regional Director with a list containing the names of employees eligible to vote in the election but omitted the employees' addresses. The incomplete list was faxed to the parties that same day by the Region. On March 22 the Employer submitted a revised list which the Region faxed to the parties on March 23. Thereafter, on March 29, the Region mailed to the parties copies of the March 22 list. Intervenor Bricklayers Local 74 and Local 56 received their copies on March 30 and April 2, respectively.

The Intervenor's objections Nos. 1-3 alleged that there were irregularities regarding the submission of the required *Excelsior* list. In overruling the objections, the hearing officer asserted that even though the Bricklayers locals did not receive a complete *Excelsior* list on March 23, the fact that that list was "obviously incomplete" should have led the Intervenor to "take affirmative steps to obtain additional copies of the March 22" list. She also determined that the Intervenor did not need the *Excelsior* list for its campaign because evidence showed that the Intervenor was able to contact eligible voters without the list and because Local 74 received a complete copy of the list on March 30, it had the list 10 days before the election. Thus, the hearing officer concluded, there was no reason to set aside the election.

Regarding the delayed receipt of an *Excelsior* list, Members Liebman and Walsh said "the relevant inquiry is whether the delay-however caused-interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be informed of the arguments concerning representation, so that they can fully and freely exercise their Section 7 rights." *Alcohol & Drug Dependency Services*, 326 NLRB 519, 520 (1998). The Board majority held that the Petitioner possessed the list significantly longer than the Intervenor and this disparity placed the Intervenor at an obvious disadvantage. *Special Citizens Futures Unlimited*, 331 NLRB No. 19 (2000), slip op. at 2. They set aside the election and directed a second election.

In a separate concurring opinion, Chairman Hurtgen stated that this case differs from *Alcohol & Drug Dependency Services*, a case in which he dissented. In *Alcohol & Drug Dependency*, he noted there was no showing of material prejudice. Both cases involve errors by the Region, not the Employer. However, he finds prejudice to one of the two competing unions in the instant matter. In sum, he said

[T]he Petitioner received the complete list 7-10 days before the Intervenor received it. It is clear that the *Excelsior* list is very important for purposes of communicating with employees. In light of this, it seems apparent to me that a union that has the list 7-10 days before its rival is blessed with a significant advantage. The rival is at a concomitant disadvantage, and is substantially prejudiced vis-?-vis the other union. . . . [I]n view of the Board's compelling interest in assuring fairness and the appearance of fairness in elections, I join my colleagues in setting aside the election.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Mastronardi Mason Materials Co. (29-CA-20589, 21060; 336 NLRB No. 136) Jamaica, NY Dec. 18, 2001. The Board agreed with the administrative law judge that Respondent Queens Ready Mix (QRM) was an alter ego of Respondent Mastronardi

Mason Materials Co. and violated Section 8(a)(3) and by (1) of the Act by conditioning the re-employment of employees McCabe and Iadanza on their withdrawal from union membership and acceptance of the nonunion terms and conditions of employment unilaterally imposed by QRM, and by refusing to rehire them because they refused to renounce their union affiliation. The Board also affirmed the judge's finding that QRM violated Section 8(a)(2) and (1) by recognizing Service Employees International Union Local 355. In doing so, he rejected the Respondent's contention that it had an objective basis for believing that the employees had rejected the Charging Party incumbent Union and had selected Local 355. The judge applied the pre-*Levitz*, good-faith-doubt (uncertainty) standard for an employer's withdrawal of recognition from an incumbent union (here, Charging Party Teamsters Local 282). [\[HTML\]](#) [\[PDF\]](#)

In *Levitz*, 333 NLRB No. 105 (2001), which issued after the judge's decision in this case, the Board held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." However, the Board held that its analysis and conclusions in that case would only be applied prospectively.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Teamsters Local 282; complaint alleged violation of Section 8(a)(1),(2),(3) and(5). Hearing at Brooklyn, Dec. 16, 21, and 23, 1998, and Jan. 20 and Mar.19, 1999. Adm. Law Judge Steven Davis issued his decision Sept. 17, 1999.

* * *

Mercy Hospital of Buffalo (3-CA-21600; 336 NLRB No. 134) Buffalo, NY Dec. 18, 2001. The Board disagreed with the administrative law judge's finding that the Respondent and Southtowns Catholic MRI are a single employer and that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to apply its collective bargaining agreement with the Union to the employees of Orchard Park performing MRI services at a new facility, Southtowns MRI Associates. However, the Board adopted the judge's finding that the Respondent violated Section 8(a)(1) and (5) by refusing to comply with the Union's information requests of August 3, 1998 and January 25, 1999. It also upheld the judge's dismissal of the complaint allegations that the Respondent violated the Act by unilaterally transferring its MRI work to another facility and closing its MRI facility at the Medical Park facility and the Respondent's failure to bargain over the effects of the relocation decision. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Communications Workers Local 1133; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Buffalo on Oct. 25-27, 1999. Adm. Law Judge Karl H. Buschmann issued his decision June 27, 2000.

* * *

Miramar Sheraton Hotel (31-CA-22971, 23902; 336 NLRB No. 123) Santa Monica, CA Dec. 13, 2001. The administrative law judge found, with Board approval, that the Respondent violated Section 8(a)(1) of the Act when it granted retroactive pay increases to employees Art Tolentini, Deborah Mackron, and Alicia Ojeda in December 1995, and when it granted an additional pay increase to Ojeda on August 21, 1997, in order to reward and encourage antiunion activity. The Board found it unnecessary to pass on the General Counsel's and Charging Party's exceptions to the judge's dismissal of additional allegations of unlawful wage increases, inasmuch as an additional finding would be cumulative and would not affect the remedy. For the same reason, Chairman Hurtgen found it unnecessary to decide whether the wage increase granted to Ojeda in August 1997 was unlawful. The Board affirmed the judge's rejection of the Respondent's 10(b) statute of limitations defense as to the increases, but it did not rely on his analysis. [\[HTML\]](#) [\[PDF\]](#)

The judge denied the General Counsel's and the Charging Party's request for a novel make-whole remedy and instead recommended an affirmative recordkeeping remedy. The General Counsel and the Charging Party did not except to his failure to recommend the requested remedy and the Respondent did not except to the recordkeeping remedy. Citing *WestPac Electric*, 3321 NLRB 1322 (1996), the Board exercised its remedial discretion in the absence of exceptions and found no need for either remedy because the Respondent is no longer the owner and operator of the hotel involved here, the successor employer and the Charging Party have agreed on the terms of a new collective-bargaining agreement, and the three antiunion employees favored

with unlawful wage increases no longer work at the hotel.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Hotel Employees and Restaurant Employees Local 814; complaint alleged violation of Section 8(a)(1). Hearing at Los Angeles for 11 days between Nov. 30, 1998 and June 24, 1999. Adm. Law Judge Timothy D. Nelson issued his decision April 6, 2001.

* * *

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Associated Builders, Inc. (Ironworkers Local 751) Anchorage, AK November 6, 2001. 19-CA-27319; JD(SF)-88-01, Judge John J. McCarrick.

Perfection Bakeries, Inc. (Teamsters Local 414) Fort Wayne, IN December 18, 2001. 25-CA-27719-1; JD-164-01, Judge C. Richard Miserendino.

Centrex Independent Electrical Contractors and Mills Electric, Inc. (Electrical Workers [IBEW] Local 520) Austin and Houston, TX December 19, 2001. 16-CA-19900; JD(ATL)-78-01, Judge Keltner W. Locke.

U. S. Postal Service (an Individual) Woodbridge, VA December 19, 2001. 5-CA-29444; JD-159-01, Judge Marion C. Ladwig.

Provena Hospitals, d/b/a Provena Saint Joseph Medical Center (Illinois Nurses Association) Frankfort, IL December 21, 2001. 13-CA-39122-1; JD-162-01, Judge Bruce D. Rosenstein.

* * *